No. 15 Orig.

Brf. of Baker for Pet.

Office Supreme Court U.S.
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Filed Oct. 15, 1900.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Original No.

EX PARTE: IN THE MATTER OF EDGAR DE BARA.

Petition for the Writ of Habeas Corpus.

BRIEF FOR PETITIONER.

D. W. BAKER,
Counsel for Petitioner.

LAW REPORTER PRINT.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Original No.

EX PARTE: IN THE MATTER OF EDGAR DE BARA.

Motion for Leave to File Petition for the Writ of Habeas Corpus.

Now comes the petitioner, by his counsel, and moves this Honorable Court for leave to file his annexed petition praying for the writ of *habeas corpus* directed to John L. McDonell, superintendent of the House of Correction at Detroit, in the State of Michigan; and asks that a rule may be issued upon said superintendent to show cause why the writ of *habeas corpus* should not be granted him.

D. W. BAKER,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

EX PARTE: IN THE MATTER OF EDGAR DE BARA.

Petition for the Writ of Habeas Corpus.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Edgar de Bara, respectfully shows:

1. That he is a citizen of the United States and a former

resident of the State of Illinois; that on June 5th, A. D. 1899, he was convicted in the United States District Court for the Northern District of Illinois, upon the charge of violating section 5480 of the Revised Statutes of the United States which prohibits the use of mails for fraudulent purposes, and on June 17th there was pronounced against him the following sentence, to wit: "Came the parties by their attorneys and the defendant in his own proper person in the custody of the marshal to have the sentence and the judgment of the court pronounced upon him, he having heretofore, to wit, on the 5th day of June, 1899, one of the days of this term of court, been found guilty by a jury in due form *as charged in the indictment filed herein* against him; and the defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him, and showing no good and sufficient reason why sentence and judgment should not be pronounced, it is therefore considered by the court and as the sentence and the judgment of the court upon the verdict of guilty so rendered by the jury as aforesaid, that the defendant Edgar de Bara be confined and imprisoned in the House of Correction at Detroit, Michigan, for and during the term of three years;" and that thereafter, on the 20th day of June, A. D. 1899, an order was made by said court that said sentence against your petitioner begin to run at noon, June 20th, A. D. 1899, and since said day, your petitioner has been confined in said House of Correction at Detroit in the State of Michigan.

2. Your petitioner avers that although there was but one offense committed by your petitioner, there was filed against him numerous indictments all of which charged in a different way, the same offense, and that all of said indictments were for violating section 5480 of the Revised Statutes of the United States, which said section provided that anyone violating the provisions of said section "shall upon conviction be punishable by a fine of not more than $500 and by

imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court.

"The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the postoffice establishment enters as an instrument into such fraudulent scheme and device."

And that said record of said United States Court in and for the Northern District of the State of Illinois shows that your petitioner was convicted of the offense set out in said section and that he was sentenced to a greater punishment than set out in said section. Your petitioner refers to a certified copy of said record and makes the same a part of this petition, marking it Exhibit "A"; and that said record shows that there was pronounced against your petitioner but one sentence as upon his having been found guilty by a jury in due form as charged in the indictment filed against him, and your petitioner avers that the said several other indictments were mere surplusage and a restatement of the matter contained in indictment No. 3,012, and that no evidence was given against your petitioner except evidence of the offense stated in indictment No. 3,012, and that said sentence was null and void and of no effect.

3. Your petitioner further avers that under said section 5480 your petitioner could not have been in prison for a longer period than eighteen months; that in a commutation for good behavior, under the laws of the United States and rules and laws of the State of Michigan as applied to said House of Correction at Detroit, Michigan, your petitioner, on account of good conduct, would be entitled to a deduction of three months from said sentence of eighteen months. That your petitioner has been confined in said House of Correction at Detroit, Michigan, for a full period

of eighteen months, less a deduction which your petitioner is entitled to on account of good conduct, and that your petitioner has fully satisfied any sentence that could be imposed upon him under said section 5480; that notwithstanding said sentence was void, your petitioner has served such part thereof as could have been imposed, and therefore your petitioner says that he was unlawfully restrained of his liberty by the said superintendent of said House of Correction aforesaid, so that on account of the fact that said sentence heretofore imposed on him was absolutely null and void and that he has served the full sentence that could be imposed on him under said section 5480 of the Revised Statutes of the United States, the commitment by which he is now held is unlawful, and that he is restrained of his liberty contrary to the laws of the United States and in violation of the Constitution.

Your petitioner therefore PRAYS that the writ of *habeas corpus* may be issued from this Honorable Court, or by one of the judges thereof, directed to John L. McDonell, superintendent of said House of Correction at Detroit in the State of Michigan, commanding him to produce the body of your petitioner, with the day and cause of his caption and detention, *and his warrant therefor*, to do, submit to, and receive whatsoever the court shall consider in that behalf.

And this your petitioner will ever pray.

EDGAR DE BARA,
By D. W. BAKER,
His Attorney in Fact.

D. W. BAKER,
Counsel for Petitioner.

D. W. Baker being duly sworn, deposes and says that he is the counsel for Edgar de Bara, the petitioner in this cause, and that said Edgar de Bara is now confined in the House of Correction at Detroit, Michigan, and that your affiant has read over the statements set out in said petition

and has personal knowledge, from the examination of the records in said cause, and believes the statements in the petition of said Edgar de Bara for a writ of *habeas corpus*, to be true.

D. W. BAKER.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 20th day of September, A. D. 1900.

MAURICE D. ROSENBERG,
Notary Public, D. C.

[SEAL]

ARGUMENT.

The contention of the petitioner is briefly this:

That the record of his conviction and the warrant for his detention shows that he is at the present time unlawfully restrained of his liberty, the sentence of three years' imprisonment being in excess of that authorized by the statute and therefore the judgment against him and the warrant for his detention are unlawful and void, he having served the legal period required by said statute.

Section 5480 of the Revised Statutes of the United States as amended (first supp. Rev. Stat. p. 694), under which petitioner was indicted, distinctly provides as a punishment for offenses under said section that there shall be but one sentence and that sentence shall not be for more than eighteen (18) months, or there may be a fine and imprisonment for not more than eighteen (18) months. The act of Congress of March 3, 1875 (18 Stats. at Large, p. 479), provides for a commutation of the sentence for good behavior, which commutation petitioner is entitled to under the laws regulating United States convicts in the House of Correction at Detroit, Michigan, so that at this time petitioner has served the full period of eighteen (18) months prescribed by the statutes, less the deduction for good behavior which he alleges in his petition he is entitled to, and about which, counsel is informed, there will be no dispute in the return, petitioner's sentence commencing June 20, 1899, and he being entitled to three months' commutation for good behavior.

On an examination of the record in this case it will be seen that the judgment and sentence pronounced by the United States District Court for the Northern District in Illinois, is confined to the indictment in case number 3012, and there can be, on examination of the record, no other construction put on the judgment. If, however, it were

possible to construe the judgment and the sentence of the court as covering the verdict of guilty in the consolidated cases which were tried with the case number 3012, then, as the sentence does not purport to impose cumulative sentences, the sentence for three years must be construed as a three years' sentence on each indictment and not successive sentence on two or more indictments. As such, they would run concurrently, the rule being that unless sentences are stated by the court to run successively, they must be construed as running concurrently.

United States *vs.* Patterson, 29 Fed. Rep. 775.
In re Jackson, 3 McArthur (D. C.), 24.

But this question can not arise in this case because petitioner says that the other indictments which were consolidated were merely a restatement or rehash of the offenses charged in the indictment number 3012, and it is undoubtedly true that in that case there could not be a sentence on each indictment, and indeed where indictments are consolidated, it is questionable whether there can be more than one sentence unless all of them together do not amount to more than the extreme penalty in one case.

It is not necessary in this case, to consider the case whether or not the whole sentence is a nullity. This matter was thoroughly discussed by the Circuit Court of Appeals in the case of Ex parte de Bara, 99 Fed. Rep. 943, and there the court held the sentence good for a period of eighteen (18) months. This, it is insisted, was an error on the part of the court, and a review of the case will fully disclose the fact that the cases cited by the Circuit Court of Appeals in no way uphold their contention. However the Circuit Court of Appeals held that an application could be made for the writ of *habeas corpus* after the expiration of what that court termed a valid sentence, and it is well established that where a sentence of this kind is upheld as being partly valid, that as soon as the legal period has expired

the person imprisoned can be discharged on a writ of *habeas corpus*.

People *vs.* Jacobs, 66 N. Y. 8.
People *vs.* Baker, 89 N. Y. 460.
In re Taylor, 7 S. D. 382.

And it is well settled by this court that if the court has jurisdiction of the subject matter and of the party, it must also act within its jurisdiction in pronouncing sentences, and if it does not, the proceedings of the court can be reviewed on *habeas corpus*.

Ex parte Lange, 18 Wall. 163, 176.
Ex parte Wilson, 114 U. S. 417.
Hans Neilson, Petitioner, 131 U. S. 176, 185.
In re Mills, 135 U. S. 263, 270.
In re Bonner, 151 U. S. 242, 258.

The simple question here then is to decide whether the petitioner can be discharged on having served the time required by the statute. The answer to the question, that "he can be discharged" is so simple that it hardly needs any authorities to support it, for it is well settled that if the sentence is in excess of that authorized and can not be separated, the whole sentence is void, or if it is in excess of the authority authorized and separable, then the excess is void and the party is entitled to be discharged. This principle is acknowledged by the Circuit Court of Appeals in the de Bara case and also by this court in the case of the United States *vs.* Pridgeon, 158 U. S. 48, where the court, speaking through Mr. Justice Jackson, say:

> "Without undertaking to review the authorities in this and other courts, we think this principle is established, that where a court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence as may be in excess open to question and attack.

> In other words, the sound rule is that a sentence is legal so far as it is within the provisions of the law and the jurisdiction of the court over the person and offense, and only void as to the excess *when such excess is separable*, and may be dealt with without disturbing the valid portion of the sentence,"

and in the case of In re Graham, 138 U. S. 461, 462, this court intimates that according to the general rule a sentence which exceeds in time, the punishment prescribed by law is absolutely void, but holds absolutely, following the Wisconsin authorities, that even if the sentence is voidable the party is entitled to be discharged on writ of *habeas corpus* after the legal part of the sentence has been satisfied.

Therefore, while contending that the sentence in this cause is absolutely null and void, it is respectfully submitted that it is not necessary for this court to decide that question, because the petition for the writ and the record and warrant for holding petitioner show that petitioner has served the legal part of his sentence and that he is entitled to be discharged, as he is now held without authority or warrant of law.

D. W. BAKER,
Counsel for Petitioner.

EXHIBIT "A."

Pleas had at a regular term of the District Court of the United States for the Northern Division of the Northern District of Illinois, begun and held at the United States Court Rooms in the City of Chicago in said Division of said District on the third Monday of December, it being the 19th day thereof, in the year of Our Lord, One Thousand Eight Hundred and Ninety-eight, and of the Independence of the United States of America, the one hundred and twenty-third year.

Present the Honorable Christian C. Kohlsaat, Judge of said Court, presiding; John C. Ames, United States Marshal for said District, and T. C. MacMillan, Clerk of said District Court.

Be it remembered that heretofore, to wit: On the 5th day of May, A. D. 1899, it being one of the days of the regular December term of the District Court of the United States for the Northern Division of the Northern District of Illinois, begun and held in the United States Court Rooms in the City of Chicago, on the third Monday of December, it being the 19th day thereof, in the year of Our Lord, One Thousand Eight Hundred and Ninety-eight, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs.
EDGAR DE BARA AND FANNIE DE BARA. } 3012.

Come the Grand Jury this day and return in open court, an indictment against Edgar de Bara and Fannie de Bara, the defendants herein, whereupon, on motion of the District Attorney, it is Ordered by the Court that said indictment be filed, and the cause placed on the dockets of this Court.

And afterwards, to wit: On the 5th day of May, A. D. 1899, said indictment was filed, the same being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

For the Northern District of Illinois, Northern Division, of the May Adjourned Term, in the year of our Lord eighteen hundred and ninety-nine.

NORTHERN DISTRICT OF ILLINOIS, *Northern Division.* } *Sct.*

The grand jurors for the United States of America, inquiring for the Northern Division of the Northern District of Illinois, upon their oath present, that Edgar de Bara and Fannie de Bara, late of the city of Chicago, in the said division and district, before and at the several times of the committing of the several offenses hereinafter mentioned, at Chicago aforesaid, in the division and district aforesaid, had devised a scheme and artifice to defraud divers other persons, then resident outside of the said United States, to wit, in Great Britain, by causing to be published in divers newspapers in that country divers advertisements to the effect following, that is to say:

> A Fortune To Be Made.—Wanted, in every locality, intelligent man or lady as inspector and collecting agent for penny-in-the-slot machines; good salary and share profits, without leaving present occupation or residence.—W., Chic. Coy., 748, Madison St., Chicago, D. (America.) Letter postage is 2½d.

and by this means inciting the persons so intended to be defrauded to open communication with them the said Edgar de Bara and Fannie de Bara by means of the Post Office Establishment of the said United States, and by

thereupon pretending to those persons respectively, by and through a correspondence, under the false and assumed name and designation of Geo. B. Henschel, Manager of The Edison Phonograph Company, that the said pretended company was desirous of employing agents to sell phonographs on commission, and to superintend the placing and keeping in public places of partially paid for penny-in-the-slot phonographs, and accounting for a portion of the receipts therefrom until the said pretended phonograph company should be fully paid therefor, and also to appoint sub-agents, and offering to make the said persons to be defrauded such agents, and to supply them with phonographs of the manufacture of the said pretended company, and with stationery, catalogues, pricelists, circulars and cards pertaining to their agency, and thereby inducing those persons to send and pay their moneys respectively to them, the said Edgar de Bara and Fannie de Bara (under the false and assumed named and designation aforesaid), for such phonographs, stationery, catalogues, pricelists, circulars and cards, but intending merely to get possession of such moneys as should be so sent and paid to them and to convert the same to the own use of them, the said Eegar de Bara and Fannie de Bara, without rendering anything of value therefor, and to defraud thereof the several persons who should so send and pay the same—the phonograph company which the said Edgar de Bara and Fannie de Bara so pretended to represent, being, as the grand jurors aforesaid, upon their oath aforesaid, charge the fact to be, a mere non-existent, fictitious, fraudulent and pretended company; which said scheme and artifice was a scheme and artifice which they, the said Edgar de Bara and Fannie de Bara, intended to effect by opening correspondence and communication (under the false and assumed name and designation aforesaid), by means of the Post Office Establishment of the said United States, with the persons so intended to be defrauded, and by inciting those persons to open

communication with them the said Edgar de Bara and Fannie de Bara (under the same name and designation) by means of the said Post Office Establishment. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Edgar de Bara and Fannie de Bara, on the twenty-second day of September, in the year of our Lord eighteen hundred and ninety-eight, at Chicago aforesaid, in the division and district aforesaid, so having devised the said scheme and artifice, in and for executing the same, and attempting so to do, unlawfully did place in the post office of the said United States at Chicago aforesaid, and cause to be placed in that post office, to be sent and delivered by the said Post Office Establishment, a circular, to wit: a certain printed circular, in the form of a letter, of the tenor following, that is to say:

President, James Winthrop Lattimer.
Secretary, Frederic C. Merrill.
Manager, Geo. B. Henschell.

Telephone Main 5387. Cable address "Phone Co."
Chicago.

THE EDISON PHONOGRAPH CO.

Thos. A. Edison, Inventor of the Phonograph.

Phonographs, Graphophones, Projectoscopes, Kinetoscopes, Kintophones, X-Ray Apparatus, Batteries, Attachments, Records & Parts.

Branches in the United States:

No. New York. Boston. New Orleans. San Francisco.

Over 400 Agents in all the Principal American Towns.

CHICAGO, ILL., September 22, 1898.

Mr. GEORGE KIRBY,
Leeds.

DEAR SIR: Your letter in reply to our advertisement for an agent and addressed to our advertising agency has been received and we send you herewith full particulars of the conditions under which we are willing to appoint you our

General Agent for your county to take charge of our business and to obtain sub-agents. We are manufacturers of the phonograph and we do not doubt you have heard of this wonderful invention, if not actually seen some.

It is no exaggeration to say that there is absolutely no article at the present moment so well adapted to bring a substantial fortune to an intelligent and active person as the phonograph is capable of doing for you. We need hardly point out to you the numerous advantages the Edison phonograph offers over every other article. Like the bicycle at the beginning it is getting immensely popular with all classes, for it is everything to everybody. To the business man it is a faithful stenographer, to the child it is a never ending source of delight, to the sick it is the most cheerful companion, to the scientist the most marvelous instrument ever invented, and for the sitting room, the public house or place of amusement an untiring brilliant musician who plays, acts and sings without a penny of wages.

Everybody needs one and will buy one now as our prices have been so far reduced as to bring them within the reach of everybody and this is all the surer as Christmas is soon approaching when our 12s machine will be found an ideal present—inexpensive, novel, useful and universally entertaining.

Our most important object is to place at once one of our automatic penny-in-the-slot machines in your neighborhood. We will share the profit with you as explained in the accompanying instructions, and as such profit is from 7s to 9s per day and per machine, this alone would be a permanent source of income to you, without necessitating more of your attention than collecting every two or three days the receipts from the drawer of the machine.

Our conditions are very liberal and advantageous, as it is proved by our agents here and in Canada, who make on an average from 15 to 30 pounds monthly. This seems a

large commission; but give the phonograph a trial and convince yourself. This agency would not interfere with your present occupation or residence, as all the business can be done in spare time, as mailing price lists, showing samples to shopkeepers, etc.

As the Xmas season is approaching, and desiring to reap the advantage of same for our goods, you will kindly forward your definite application by return of post.

We remain, dear sir,

Yours faithfully,

FOR THE EDISON PHONOGRAPH COMPANY,

GEO. B. HENSCHEL,

Manager.

then and there inclosed in an envelope directed to one George Kirby, at Leeds, England, by, and then bearing, the following direction and address, to wit:

Europe, per S. S.

Mr. GEO. KIRBY,

a

122–Beeston Rd.,

Leeds, England,

Great Britain.

against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Edgar de Bara and Fannie de Bara, on the eighteenth day of October, in the year of our Lord eighteen hundred and ninety-eight, at Chicago aforesaid, in the division and district aforesaid, so having devised the scheme and artifice to defraud in the first count of this indictment described, in and for executing the same, and attempting so to do, unlawfully did take and receive from the postoffice of the said United States at Chicago aforesaid, a certain letter and packet, to wit: a registered letter,

then bearing registry No. 40708, directed to Geo. B. Henschel, manager Edison Phonograph Company, at Chicago, aforesaid: against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Edgar de Bara and Fannie de Bara, on the twenty-first day of November, in the year of our Lord eighteen hundred and ninety-eight, at Chicago aforesaid, in the division and district aforesaid, so having devised the scheme and artifice to defraud in the first count of this indictment described, in and for executing the same, and attempting so to do, unlawfully did take and receive from the postoffice of the said United States at Chicago, aforesaid, a certain letter and packet, to wit: a registered letter then bearing registry No. 72196, directed to G. B. Henschel, manager Edison Phonograph Company, at No. 115 Dearborn street, in Chicago aforesaid, against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

S. H. Bethea,
United States Attorney.

[Indorsed:] 3012. No. United States District Court, Northern District of Illinois. Northern Div. The United States of America *vs.* Edgar de Bara et al. Indictment. On Sec. 5480, R. S. Sec. Act of Mar. 2, 1899. I Suppl. R. S. 694. A True Bill. Jason G. Hall, Foreman. Filed in open court this fifth day of May, A. D. 1899. T. C. MacMillan, Clerk. Bail, ——. ——— ———Judge.

And afterwards, to wit, on the 11th day of May, A. D. 1899, the following order was had and entered of record in said

cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs. } 3012.
EDGAR DE BARA ET AL.

Come the parties by their attorneys, and the defendant, Edgar de Bara, in his own proper person, and on motion of S. H. Bethea, Esq., District Attorney, It is Ordered by the Court that the amount of the bail herein of the said defendant, Edgar de Bara, be and the same is hereby fixed at the sum of One Thousand Dollars.

And afterwards, to wit, on the 15th day of May, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs. } 3012
EDGAR DE BARA, FANNIE DE BARA.

Now comes the United States by S. H. Bethea, Esq., United States Attorney for this District, also come the defendants, Edgar de Bara and Fannie de Bara, in their own proper persons, as well as by counsel, and enter their motion to quash the indictment herein and ask until tomorrow morning to put same in writing, which motion is by the Court overruled, to which ruling of the Court the defendants by their counsel except, and thereupon the said defendants are ordered arraigned, to which order of the Court the defendants except. Thereupon the said defendants, Edgar de Bara and Fannie de Bara, are arraigned upon the indictment filed herein against them, and for plea thereto the said defendant, Edgar de Bara, says he is not guilty in manner and form as therein

charged, and the said defendant, Fannie de Bara, for plea to said indictment says she is not guilty in manner and form as therein charged.

And afterwards, to wit: on the 15th day of May, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs.
EDGAR DE BARA, FANNIE DE BARA. } 3012.

On motion of the District Attorney that the amount of the bail of the defendant, Fannie de Bara, be increased, It is Ordered by the Court that the bail of the said defendant, Fannie de Bara, be, and the same hereby is fixed at the sum of Five Hundred Dollars in this cause.

And afterwards, to wit: on the 1st day of June, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs.
EDGAR DE BARA, FANNIE DE BARA. } 3012.

Come the parties by their Attorneys, and in open court and in the presence of the defendants, and with their consent, agree that causes numbered 3008–3009–3010–3011–3012–3013–3014–3015–3016–and 3017 shall be consolidated and tried with this cause, and that all of said causes be tried together by the same jury.

Thereupon it is ordered by the court that said causes be consolidated.

And afterwards, to wit: on the 1st day of June, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs. } 3012.
EDGAR DE BARA, FANNIE DE BARA.

Come the parties by their attorneys, and the defendants in their own proper persons, and said defendants having heretofore, to wit, on the 15th day of May, A. D. 1899, interposed pleas of not guilty to the indictments filed herein against them, for their defense now put themselves upon their country, whereupon comes a jury of good and lawful men, to wit, Arthur M. Newcomer, William H. Elson, Thomas Wyant, Henry Holz, A. W. Curran, Peter C. Dick, Dewit C. Brady, B. Healy, G. A. Stanley, Fred Knowles, Austin P. White, and R. C. Knaggs, who are duly elected, empaneled and sworn in causes numbered 3007–3008–3009–3010–3011–3012–3013–3014–3015–3016 and –3017 consolidated, in each of which said causes the United States is the plaintiff, and Edgar de Bara and Fannie de Bara are the defendants, a true verdict to render, according to the evidence.

The usual hour of adjournment having arrived, it is ordered by the court that the further trial of this cause be continued until tomorrow morning at nine o'clock.

And afterwards, to wit, on the 1st day of June, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs.
EDGAR DE BARA, FANNIE DE BARA. } 3012.

On motion of S. H. Bethea, Esq., United States Attorney, It is Ordered by the Court that the Marshal furnish meals and lodging to the jurors engaged in the trial of this cause.

And afterwards, to wit: on the 2nd day of June, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs.
EDGAR DE BARA, FANNIE DE BARA. } 3012.

This being the day and hour to which the further trial of this cause was on yesterday continued, come again the parties by their attorneys, and the defendants in their own proper persons, come also the jury who were duly elected, empaneled and sworn herein, and the trial proceeds.

During the examination of witnesses, the usual hour of adjournment having arrived, It is Ordered by the Court that the further trial herein be continued until tomorrow morning at nine o'clock.

And afterwards, to wit, on the 3rd day of June, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs.
EDGAR DE BARA, FANNIE DE BARA. } 3012.

This being the day and hour to which the further trial

of this cause was on yesterday continued, come again the parties by their attorneys, and the defendants in their own proper persons, come also the jury who were duly elected, empaneled and sworn herein, and the trial proceeds.

During the examination of witnesses, the usual hour of adjournment having arrived, It is Ordered by the Court that the further trial herein be continued until Monday morning at nine o'clock.

And afterwards, to wit: on the 5th day of June, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs. } 3012.
EDGAR DE BARA, FANNIE DE BARA.

This being the day and hour to which the further trial of this cause was on Saturday continued, come again the parties by their attorneys, and the defendants in their own proper persons, come also the jury who were duly elected, empaneled and sworn herein, and the said jury having heard the evidence by the parties adduced, arguments of counsel and charge of the court, retire to their room to consider of their verdict, and after due consideration, return into Court and render their verdict in writing, and upon their oath do say: We, the Jury, find the defendants Edgar de Bara and Fannie de Bara, guilty as charged in indictments 3009 –3012 –3015 –and all the counts therein, We also find the defendants, Edgar de Bara and Fannie de Bara, guilty in counts two and three as charged in indictments # 3007 –3008 –3010 –3011 –3013 –3014 –3016 –3017.

Thereupon the defendants by their attorneys move the court for a new trial herein.

And afterwards, to wit: on the 6th day of June, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs. } 3012.
EDGAR DE BARA ET AL.

On motion of C. B. Morrison, Esq., Assistant United States Attorney, it is ordered by the Court that the Marshal pay to George Kirby, a witness for the United States herein, the sum of Two Hundred Eighty and 85/100 Dollars; to John White, the sum of Two Hundred sixty-three and 25/100 Dollars; to H. Cottle, the sum of Three Hundred Sixty-three and 02/100 Dollars, and to Thomas Allen, the sum of Two Hundred Sixty-one and 85/100 Dollars, their actual and necessary expenses in coming to and returning from Court as witnesses in the above entitled cause.

And afterwards, to wit: on the 17th day of June, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs. } 3012.
EDGAR DE BARA, FANNIE DE BARA.

Comes the United States by S. H. Bethea, Esq., District Attorney, and declines to prosecute the first count in each indictment in cases numbered 3007–3008–3010–3013–3014–3016–and 3017, whereupon It is ordered by the Court that a *nolle prosequi* be and the same is hereby entered herein, as to said first count in each of said indictments.

And afterwards, to wit: in the 17th day of June, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs. } 3012
EDGAR DE BARA, FANNIE DE BARA.

Come the parties by their Attorneys, and the defendants by their counsel, move the Court for leave to have the record amended to show that the Government was requested to elect on which indictment it would proceed, which motion, after having heard the arguments of counsel, the Court denies, to which ruling of the Court defendants by their counsel except.

And afterwards, to wit: on the 17th day of June, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs. } 3012
EDGAR DE BARA, FANNIE DE BARA.

This cause coming on to be heard on defendant's motion for a new trial, and in arrest of judgment, come the parties by their Attorneys and the Court having heard the arguments of counsel, and being now fully advised in the premises, denies said motion, to which ruling of the Court the defendants by their counsel, except.

And afterwards, to wit: On the 17th day of June, A. D. 1899, the following order was had and entered of record in

said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs.
EDGAR DE BARA. } 3012. 5480 Vio. Postal Laws.

Come the parties by their Attorney, and the defendant in his own proper person, in custody of the Marshal, to have the sentence and judgment of the Court pronounced upon him, he having heretofore, to wit: On the 5th day of June, A. D. 1899, one of the days of this term of this Court, been found guilty by a jury in due form of law as charged in the indictment filed herein against him, and the defendant being asked by the Court if he has anything to say why the sentence and judgment of the Court should not now be pronounced upon him, and showing no good and sufficient reasons why sentence and judgment should not be pronounced. It is therefore considered by the Court, and as the sentence and judgment of the Court upon the verdict of guilty so rendered herein by the jury as aforesaid, that the defendant, Edgar de Bara, be confined and imprisoned in the House of Correction at Detroit, Michigan, in the State of Michigan, for and during a period of three years.

And afterwards, to wit: On the 17th day of June, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs.
FANNIE DE BARA. } 3012.

Come the parties by their Attorneys, and the defendant in her own proper person, in custody of the Marshal, to have

the sentence and judgment of the Court pronounced upon her, she having heretofore, to wit: On the 5th day of June, A. D. 1899, one of the days of this term of this Court, been found guilty by a jury in due form of law, as charged in the indictment filed herein against her, and the defendant being asked by the Court if she has anything to say why the sentence and judgment of the Court should not now be pronounced upon her, and showing no good and sufficient reasons why sentence and judgment should not be pronounced, It is therefore considered by the Court, and as the sentence and judgment of the Court, upon the verdict of guilty so rendered herein by the jury as aforesaid, that the defendant, Fannie de Bara, be confined and imprisoned in the County Jail of Du Page County, at Wheaton, in the State of Illinois, for and during a period of one year.

And afterwards, to wit: on the 17th day of June, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs. } 3012.
EDGAR DE BARA, FANNIE DE BARA.

On motion of defendants counsel, and for good and sufficient reasons to the court shown, it is ordered by the court that execution of the sentences herein be and the same are hereby stayed for ten days.

And afterwards, to wit: on the 20th day of June, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, Judge, to wit:

THE UNITED STATES
vs.
EDGAR DE BARA, FANNIE DE BARA. } 3012.

On motion of defendants, by their Counsel, It is Ordered by the Court that the order heretofore entered herein, on to wit, June 17th, A. D. 1899, staying execution of the sentences herein for ten days, be, and the same hereby is vacated, and said sentences begin to run at noon today, June 20, 1899.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA,

For the Northern District of Illinois, Northern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States of America for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of the proceedings had in said court in the cause wherein the United States is Plaintiff, and Edgar de Bara and Fannie de Bara are defendants, as the same appears from the record and files now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 8th day of September, A. D. 1900.

[Seal of Dist. Court U. S., Northern Dist. of Illinois, 1899.]

T. C. MACMILLAN,
Clerk.

Filed Oct 15, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

Original No. —

EX PARTE. IN THE MATTER OF EDGAR DE HART.

Additional Brief on Part of Petitioner.

D. W. BAKER,

Attorney for Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

Original No. —.

EX PARTE: IN THE MATTER OF EDGAR DE BARA.

Additional Brief on Part of Petitioner.

The contention made on the part of the United States in their brief filed in this case that there should be a single sentence on an indictment, in no way affects the contention of the petitioner. This single sentence must be limited by the extreme penalty prescribed in the act. The case cited in In re Henry, 123 United States, page 375, upholds the petitioner's contention; in that case, although the indictment contains three counts, there was but one sentence and that sentence was for twelve (12) months, being a valid sentence within the act.

In regard to the contention that the affidavit annexed to the writ is not sufficient, it is only necessary to say that in the case cited by the Government the writ was granted, and on an examination of the record in this case, it will show that de Bara was entitled to be released on September 20, 1900, at noon, and the fact is that this writ was sworn to immediately after that hour and was presented soon thereafter to one of the justices of the Supreme Court of the United States, asking that the justice himself act and grant the writ, but the justice thought proper that the application should be made in open court. De Bara was incarcerated at the time in the House of Correction at Detroit, Michigan, and it was impossible for him to make the affidavit, as he was entitled to make application immediately for the writ of *habeas corpus*. However, annexed to this brief will be found an affidavit setting up authority of

De Bara's attorney to make the affidavit. If, for any reason this is not sufficient, still, the authorities hold that if, upon an examination of the petition and record, the court thinks that the writ should be granted, they can ignore any technical defect. However, if necessary, counsel will obtain, if possible, an affidavit of De Bara to the petition.

D. W. BAKER,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, *ss.*

D. W. Baker, being duly sworn, deposes and says that he is the attorney for the petitioner in this case and that he is attorney in fact to make an affidavit necessary to the application for the writ of *habeas corpus*; that said petitioner, De Bara, was on the 20th day of September, 1900, incarcerated in the Detroit House of Correction and that he was entitled, as of right, on that day at noon to make an application to the Supreme Court of the United States or one of the Justices thereof, for the wit of *habeas corpus*; that he authorized your affiant to make said application and to make the affidavit to said petition for said writ; that immediately after noon on said day affiant made said affidavit and attempted to find a Justice of the Supreme Court of the United States for the purpose of presenting said petition; that he was unable to do so until Saturday following said September 20, 1900, when he presented the same to Mr. Justice Brown who refused to consider the matter on the ground that the same should properly be presented in open court.

Affiant further says that on account of the fact that the application was filed immediately after 12 o'clock, September 20, 1900, it was utterly impossible to attach the affidavit of De Bara to the same.

D. W. BAKER.

Subscribed and sworn to before me this 8th day of October, A. D. 1900.

MAURICE D. ROSENBERG,
Notary Public, D. C.

[SEAL]

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Original.]No. —

EX PARTE: IN THE MATTER OF EDGAR DEBARA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Section 5480 of the Revised Statutes, which prohibits and punishes any use of the mails of the United States for fraudulent purposes, provides the following penalty for each violation:

> Such person so misusing the post-office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments at the discretion of the court. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but

> the court thereupon shall give a single sentence and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.

It appears from the application (p. 12) that on May 5, 1899, an indictment was returned against Edgar De Bara and Fannie DeBara, which charged in three counts three separate violations of the above section. This indictment was in cause No. 3012.

A number of other indictments, under the same section, were found against these persons, and on June 1, 1899, in the presence of the defendants and with their consent, it was agreed that causes 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, and 3017 should be consolidated and tried with "this cause" (being cause 3012) and by the same jury. All these causes were accordingly consolidated. (Application, p. 19.)

The indictments, other than that in cause No. 3012, are not set forth in the application, but my information is that they were under the same section, for similar offenses, and each contained three counts.

After a trial had upon these consolidated indictments, the jury, on June 5, 1899, rendered the following verdict (Application, p. 22):

> We, the jury, find the defendants, Edgar De Bara and Fannie De Bara, guilty as charged in indictments 3009–3012–3015– and all the counts therein. We also find the defendants, Edgar De Bara and Fannie De Bara, guilty in counts two and three as charged in indictments Nos. 3007–3008–3010–3011–3013–3014–3016–3017.

On the 17th of June, 1899, a nolle prosequi was entered as to the first count in each indictment in causes 3007, 3008, 3010, 3013, 3014, 3016, and 3017 (Application, p. 23).

On the same day the following judgment was pronounced (Application, p. 25):

> Come the parties by their attorney, and the defendant in his own proper person, in the custody of the marshal, to have the sentence and judgment of the court pronounced upon him, he having heretofore, to wit, on the 5th day of June, A. D. 1899, one of the days of this term of this court, been found guilty by a jury in due form of law as charged in the indictment filed herein against him, and the defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him, and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered by the court, and as the sentence and judgment of the court upon the verdict of guilty so rendered herein by the jury as aforesaid, that the defendant, Edgar DeBara, be confined and imprisoned in the house of correction at Detroit, Michigan, in the State of Michigan, for and during a period of three years.

It does not clearly appear whether the court, in thus passing sentence, predicated its action upon a conviction had under the indictment in cause No. 3012, or upon the conviction upon all the indictments.

I understand counsel for the petitioner to contend that the sentence was based upon the indictment in cause No. 3012 alone.

Before eighteen months of his sentence expired DeBara made application to the district court for a writ of habeas corpus, claiming the entire sentence was null and void. This application was denied, and upon appeal to the circuit court of appeals the action of the lower court was affirmed. The opinion of Judge Day (the court being composed of Judges Taft, Lurton, and Day) is to be found in 99 Federal Reporter, page 942.

The court held that in any view of the case the application was made too soon. That in any view the sentence was not void but excessive, and whether it was excessive or not could not be determined upon habeas corpus until the portion clearly valid had been served. At the same time the court refrained from expressing any opinion as to the question now raised, saying (p. 947):

> We have already seen that it is within the power of the court, in any aspect of the case, to impose a sentence upon the prisoner of eighteen months. This much of the sentence the prisoner has not yet served. We do not undertake to determine herein what may be the rights of the prisoner at the expiration of the term of eighteen months, nor do we wish to be considered as in any wise foreshadowing the views which the court may hold as to his rights, should further application for the writ be made at that time.

ARGUMENT.

I.

Section 754 of the Revised Statutes provides that an application for a writ of habeas corpus shall be made in writing signed by the person for whose relief it is intended

and verified on oath. If it is not signed and sworn to by the person for whose relief it is intended, a sufficient reason must be shown, and no sufficient reason is shown in this case. The only reason given is that the man is in prison. But that reason would apply to practically every case, and nullify the provision of the statute which I have quoted.

Church on Habeas Corpus (section 89, note 3) says:

> One making an application for the writ of habeas corpus *ad subjiciendum* must, if he apply for or on behalf of another, make an affidavit of authority, or show that there is such restraint that it can not be given.

In *Ex Parte Hibbs* (26 Fed. Rep., 421) Judge Deady says (p. 435):

> I also think it proper to call attention to the fact that the application for this writ was not made and verified by the prisoner, as required by section 745 of the Revised Statutes.

II.

If the court shall be of opinion that the sentence was restricted to the indictment in cause No. 3012, the question to be determined is whether, in view of the conviction on the three counts charging three separate and distinct offenses, the court was or was not restricted to the punishment provided for a single offense. The punishment prescribed by the statute is "imprisonment for not more than eighteen months." This is the punishment for one offense. At the same time the statute provides that the indictment may severally charge offenses to the number of three when committed within the same

six calendar months, but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.

Does the phrase "a single sentence" mean a sentence restricted to the punishment provided for a single offense, or does it mean a sentence restricted to the punishment which may, under the statute, be imposed for three separate and distinct offenses? "A single sentence" must be imposed, although the prisoner is convicted of three separate offenses, and in this "single sentence" the court is required to "proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device." This would seem to confer upon the court a discretion additional to that conferred by the preceding portion of the section.

Under section 1024 separate offenses growing out of the same transaction may be charged in one indictment, and separate indictments found under such circumstances may be consolidated.

What was the purpose of the special authority given in the statute under consideration and the additional discretion conferred if not to permit the imposition in one sentence of the maximum punishment provided for the three separate offenses in case the court believed the character of the crime demanded it.

In the case of *In re Henry* (123 U. S., 372), Chief Justice Waite, speaking for the court, said, respecting the statute under discussion (p. 373):

> Under the present statute three separate offenses, committed in the same six months, may be joined, but not more, and when joined there is to be a single sentence for all. *That is the whole scope and meaning of the provision, and there is nothing whatever in it to indicate an intention to make a single continuous offense, and punishable only as such, out of what, without it, would have been several distinct offenses, each complete in itself.*

And yet, if three separate offenses are joined in one indictment, and a single sentence must be imposed, and this sentence restricted to the punishment for one sentence, the effect, so far as the prisoner is concerned, *is to merge his three offenses into one and punish him only for one, although found guilty of three.*

The act authorizing the joinder of offenses in one indictment, said the court in *Ex parte Hibbs* (26 Fed. Rep., 426)—

> was intended to promote the speedy and economical administration of justice in such cases, in the interest both of the Government and the defendant, *and not practically to merge two or more distinct offenses into one, for the benefit of the latter.* Nor is there any reason why a party who has committed two distinct offenses, which for the convenience of the prosecution as well as the defense are joined in one indictment, *can only be punished as for one, though found guilty of both.*

III.

If, however, the court should be of the opinion that a sentence exceeding eighteen months could not be imposed under one indictment although it contained three counts

for three distinct offenses, I suggest to the court that perhaps it is worthy of consideration whether the punishment was not based upon all of the indictments that were consolidated, and was intended to be cumulative, and was simply erroneous in form, so that the case should be sent back for a re-sentence.

IV.

Counsel for the petitioner is mistaken when he says that the charges in the different counts of the different indictments were simply different ways of describing the same offense. Under this statute the offense is not, as counsel would seem to suggest, the devising of the scheme to defraud, but it is the depositing of the letter in the post-office or the taking of the letter therefrom. Each such act is a distinct offense. (*In re Henry*, 123 U. S., 372, 374.)

The case is an important one. The scheme to defraud was extensive. The DeBaras made many thousand dollars by working it. A great many people, especially in England, were defrauded. The Government was put to great expense to prove the case, witnesses being brought from abroad. The punishment the court evidently intended to inflict was light, considering the character of the crime.

JOHN K. RICHARDS,
Solicitor-General.

OCTOBER 6, 1900.

O

No. 15 Orig.

Return to Rule.

Filed Oct. 29, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 15, ORIGINAL.

EX PARTE: IN THE MATTER OF EDGAR DE BARA, PETITIONER.

ON PETITION FOR WRIT OF HABEAS CORPUS.

RETURN TO RULE.

FILED OCTOBER 29, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 15, ORIGINAL.

EX PARTE: IN THE MATTER OF EDGAR DE BARA, PETITIONER.

ON PETITION FOR WRIT OF HABEAS CORPUS.

RETURN TO RULE.

1 In the Supreme Court of the United States. No. 15, original. October term, 1900.

EX PARTE: IN THE MATTER OF EDGAR DE BARA, PETITIONER.

I, John L. McDonell, hereby certify and make return to the rule to show cause why a writ of habeas corpus should not issue as prayed in the petition of the above-named petitioner; that I am superintendent of the House of Correction at Detroit, Michigan, and that I now hold the above-named petitioner in my custody as such superintendent by virtue of a certain certified copy of the judgment and sentence of the district court of the United States for the northern district of Illinois, northern division, dated June 17, 1899, a certified copy of which is hereto attached, wherein it was ordered that the above-named petitioner be confined and imprisoned in the said House of Correction at Detroit, Michigan, in the State of Michigan, for and during a period of three years, which period of three years has not yet elapsed.

JOHN L. MCDONELL,
Superintendent of the House of Correction at Detroit, Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss:*

On this 23rd day of October, in the year of our Lord one thousand and nine hundred, before me, an United States Commissioner for the eastern district of Michigan, personally appeared John L. McDonell, to me known to be the person who signed the foregoing instrument and return, and who, being by me first duly sworn, says that said instrument and return is true of his own knowledge.

[SEAL.] JOHN GRAVES,
United States Commissioner for the Eastern District of Michigan.

2 SATURDAY, *June 17, A. D. 1899.*

The district court of the United States for the northern division of the northern district of Illinois met at nine o'clock a. m., pursuant to adjournment.

Present: The Hon. Christian C. Kohlsaat, judge of said court, presiding; the clerk, and marshal.

THE UNITED STATES *vs.* EDGAR DE BARA. } 3012, § 5480 vio. postal laws.

Come the parties by their attorneys, and the defendant in his own proper person in custody of the marshal to have the sentence and judgment of the court pronounced upon him, he having heretofore, to wit, on the 5th day of June A. D. 1899, one of the days of this term of this court, being found guilty by a jury in due form of law as charged in the indictment filed herein against him, and the defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him, and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered by the court, and as the sentence and judgment of the court upon the verdict of guilty so rendered herein by the jury as aforesaid, that the defendant, Edgar De Bara, be confined and imprisoned in the House of Correction at Detroit, Michigan, in the State of Michigan, for and during a period of three years.

3 In the district court of the United States of America for the northern district of Illinois, northern division.

I, T. C. MacMillan, clerk of the district court of the United States of America, for the northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the sentence and judgment had and entered of record in said court on the seventeenth day of June, A. D. 1899, in the above-entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this twenty-second day of October, A. D. 1900.

[SEAL.] T. C. MACMILLAN, *Clerk.*

4 (Indorsed:) File No. . Supreme Court U. S., October term, 1900. Term No. 15. Origl. Ex parte in the matter of Edgar De Bara, petitioner. Return to rule filed Oct. 29, 1900.

○

Supreme Court of the United States.

No. 15, Original.—October Term, 1900.

Ex parte: In the matter of Edgar De Bara, Petitioner. } On petition for writ of Habeas Corpus.

[December 3, 1900.]

Mr. Justice McKenna delivered the opinion of the Court.

Upon filing the petition in this case a rule to show cause was issued to John L. M. Donell, Superintendent of the House of Correction, at Detroit, Michigan, by whom it is alleged the petitioner is illegally restrained of his liberty.

The petition shows that the petitioner was convicted in the United States District Court for the Northern District of Illinois, upon the charge of violating section 5480 of the Revised Statutes of the United States, which prohibits the use of the mails for fraudulent purposes, and that on June 17, 1899, he was sentenced as follows:

"Came the parties by their attorneys and the defendant in his own proper person in the custody of the marshal to have the sentence and the judgment of the court pronounced upon him, he having heretofore, to wit, on the 5th day of June, 1899, one of the days of this term of court, been found guilty by a jury in due form as charged in the indictment filed herein against him; and the defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him, and showing no good and sufficient reason why sentence and judgment should not be pronounced, it is therefore considered by the court and as the sentence and the judgment of the court upon the verdict of guilty so rendered by the jury as aforesaid, that the defendant Edgar De Bara be confined and imprisoned in the House of Correction at Detroit, Michigan, for and during the term of three years."

That the sentence was made to run from June 20, 1899, and since said day the petitioner has been confined in the House of Correction at Detroit, Michigan. That although there was but one offense committed by him, there were filed against him numerous indictments, all of which charged in a different way the same offense, and all were for violating section 5480.

That the record shows that the petitioner was convicted of the offense set out in said section, and that he was sentenced to a greater punishment than prescribed therein; that there was pronounced against him but one sentence, "as upon his having been found guilty by a jury in due

form, as charged in the indictment filed against him, and that the said several other indictments were mere surplusage, and a restatement of the matter contained in indictment No. 3012, and that no evidence was given against your petitioner except evidence of the offense stated in indictment No. 3012," and that the "sentence was null and void, and of no effect."

That petitioner could not be imprisoned for a longer period than eighteen months; and that under the commutation for good behavior he would be entitled to a deduction of three months from said sentence; and that he has been confined for a full period of eighteen months, less the deduction of which he is entitled, and has fully satisfied any sentence which could be imposed on him, and he is therefore unlawfully restrained of his liberty.

A copy of the record is attached to the petition.

In his return to the rule the Superintendent of the Detroit House of Correction justified the detention of the petitioner by the judgment and sentence of the District Court as follows:

"SATURDAY, *June* 17, *A. D.* 1899.

"The District Court of the United States for the Northern Division of the Northern District of Illinois met at nine o'clock A. M. pursuant to adjournment.

"Present: The Hon. Christian C. Kohlsaat, judge of said court, presiding; the clerk and marshal.

The United States
vs.
Edgar De Bara. } 3012, § 5480 vio. postal laws.

"Come the parties by their attorneys, and the defendant in his own proper person, in custody of the marshal, to have the sentence and judgment of the court pronounced upon him, he having heretofore, to wit, on the 5th day of June, A. D. 1899, one of the days of this term of this court, being found guilty by a jury in due form of law as charged in the indictment filed herein against him, and the defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him, and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered by the court, and as the sentence and judgment of the court upon the verdict of guilty so rendered herein by the jury as aforesaid, that the defendant, Edgar De Bara, be confined and imprisoned in the House of Correction at Detroit, Michigan, in the State of Michigan, for and during a period of three years."

The record contains only the indictment in cause No. 3012, and the return to the rule shows that the judgment and sentence under which the petition is held is designated by that number.

The indictments in the other case do not appear in the record nor does the record contain the evidence, but the following does appear:

"The United States
vs.
Edgar De Bara, Fannie De Bara." } 3012.

"Come the parties by their attorneys, and in open court and in the presence of the defendants, and with their consent, agree that causes numbered 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, and 3017 shall be consolidated and tried with this cause, and that all of said causes be tried together by the same jury.

"Thereupon it is ordered by the court that said causes be consolidated."

It further appears that on the 1st of June, 1899, under the same title and number, an order was entered reciting that on the 15th of May, 1899, that pleas of not guilty to the several indictments were interposed, and that a jury (naming them) were duly impanelled and sworn "in causes numbered 3007, 3008, 3010, 3011, 3013, 3014, 3015, 3016 and 3017 consolidated, in all of which said causes the United States is the plaintiff and Edgar De Bara and Fannie De Bara are the defendants, a true verdict to render according to the evidence."

It also appears from the record that in cause No. 3012, the jury returned into the court with a verdict, and upon their oaths did say:

"We, the jury, find the defendants Edgar De Bara and Fannie De Bara guilty as charged in the indictments 3009, 3012, 3015, and all the counts therein; we also find the defendants Edgar De Bara and Fannie De Bara guilty in counts two and three as charged in indictments Nos. 3007, 3008, 3010, 3011, 3013, 3014, 3016, 3017.

"Thereupon the defendants, by their attorneys, move the court for a new trial herein."

On the 17th day of 1899, June the following order was entered:

"The United States
vs.
Edgar De Bara, Fannie De Bara," } 3012.

"Comes the United States by S. H. Bethea, Esq., district attorney, and declines to prosecute the first count in each indictment in cases numbered 3007, 3008, 3010, 3013, 3014, 3016 and 3017, whereupon it is ordered by the court that a *nolle prosequi* be and the same is hereby entered herein, as to said first count in each of said indictments."

It is not correct therefore, as contended by counsel for petitioner, that the judgment and sentence of the district court ~~was~~ were confined to indictment in case No. 3012. The proceedings were entitled as of that case because of the consolidation, but the other cases did not lose thereby their identity and consequences. The judgment and sentence must be construed by the cases which were tried, and upon which the jury rendered its verdict. The petitioner was found guilty as charged in the indictment in 3012 on all counts; also on all counts in 3009 and 3015, and on all counts 2 and 3 of the indictments in Nos. 3007, 3008, 3010, 3011, 3013, 3014, 3016 and 3017.

Therefore the only question for our determination is whether the court had the power under section 5480 to give a single sentence for several offenses in excess of that which is prescribed for one offense. The section provides as follows:

"If any person having devised, or intending to devise, any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person, whether resident within or outside of the United States, by means of the post office establishment of the United States or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post office of the United States, or take or receive any therefrom, such person, so misusing the post office establishment shall be punishable by a fine of not more than five hundred dollars, and by imprisonment for not more than eighteen months, or by both such punishments. The indictment, information or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post office establishment enters as an instrument into such fraudulent scheme and device."

The question raised upon the statute is not an open one in this court. It is substantially ruled by *In re Henry*, (123 U. S. 372.) In that case there were two indictments, each charging three offenses. The petitioner was convicted on both indictments and sentenced on both. Upon serving out his first sentence he applied to be discharged on *habeas corpus* because, as he alleged, "the court had no jurisdiction to inflict a punishment for more than one conviction of offenses under this statute committed within the same six calendar months."

In passing on the contention the court, by the Chief Justice, said:

"We have carefully considered the argument submitted by counsel in behalf of the petitioner, but are unable to agree with him in opinion that there can be but one punishment for all the offenses committed by a person under this statute within any one period of six calendar months. As was well said by the district judge on the trial of the indictment, 'the act forbids, not the general use of the post office of a letter or packet, or the taking out of a letter or packet from the post office in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the act.' It is not, as in the case of *In re Snow*, (130 U. S. 274,) a continuous offense, but it consists of a single isolated act, and is repeated as often as the act is repeated.

"It is indeed provided that three distinct offenses, committed within the same six months, may be joined in the same indictment; but this is no more than allowing the joinder of three offenses for the purposes of a trial. In its general effect this provision is not materially different from that of section 1024 of the Revised Statutes, which allows the joinder in one indictment of charges against a person 'for two or more acts or transactions of the same class of crimes or offenses,' and the consolidation of two or more

indictments found in such cases. Under the present statute three separate offenses, committed in the same six months, may be joined, but not more, and when joined there is to be a single sentence for all. That is the whole scope and meaning of the provision, and there is nothing whatever in it to indicate an intention to make a single continuous offense, and punishable only as such, out of what, without it, would have been several distinct offenses, each complete in itself."

We need not add much to this language. The contention of the petitioner would make the punishment depend upon the manner of pleading, and, may be, upon the discretion of prosecuting officers rather than upon the violation of the law. And to what end? In mitigation of ultimate punishment? But that function is confided to the court. To it is confided the power to adapt the punishment to the degree of crime. It may sentence the full penalty upon one offense. It may, though it is not required, to do more upon three offenses, and in a single sentence of one day, or of eighteen months, or three times eighteen months, it may express its views of the criminality of a defendant, and, to use the language of the statute, "proportion the punishment especially to the degree in which the abuse of the post office establishment" enters as an instrument "in the defendant's fraudulent scheme and device."

The rule is discharged.

True copy.

Test:

Clerk Supreme Court, U. S.